LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
FEB 16 1968
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1127

CHARLES FREDERICK ROCHA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

WILLIAM KLEIN,
555 Polk Street,
San Francisco, California 94102,
Attorney for Petitioner.

EDWARD L. CRAGEN,
555 Polk Street,
San Francisco, California 94102,
Of Counsel.

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	3
Statement of the case	5
Reasons compelling the allowance of the writ	8
1. The contraband not suppressed by the United States District Court was not legally before the court at the time of the motion to suppress	8
2. Regardless of the state court proceedings herein, the affidavit in support of the search warrant does not meet federal standards	10
3. The search cannot be justified on the alternative basis that there was probable cause to arrest without a warrant when all the alleged facts are known to the officers at the time of obtaining the warrant but are not set forth in the affidavit	15
4. The Narcotic Drugs Import and Export Act, 35 Stat. 614 (1909) as amended, 21 U.S.C. Section 174 (1956) is unconstitutional in part and is therefore in violation of the Fifth Amendment to the United States Constitution	16
Conclusion	19

Table of Authorities Cited

Cases	Pages
Aguilar v. Texas, 378 U.S. 108	11, 12, 13, 15
Elkins v. U.S., 364 U.S. 206	10
Giordenello v. United States, 357 U.S. 480	11
Griffin v. California, 380 U.S. 609	17
Jones v. the United States, 362 U.S. 257	11
Malloy v. Hogan, 378 U.S. 1	17
Miranda v. Arizona, 384 U.S. 436	17
Nathanson v. United States, 290 U.S. 41	11
U. S. v. Vantresca, ... U.S.	12

Codes

Health and Safety Code:	
Sections 11500 et seq.	18
Penal Code:	
Section 1528	9
Section 1536	9
Section 1539	6
Section 1540	6

Constitutions

United States Constitution:	
Fourth Amendment	3, 10, 11, 14
Fifth Amendment	4, 16, 17, 18

Rules

USCA Ninth Circuit:	
Rule 26	2
Federal Rules of Criminal Procedure (18 USC):	
Rule 41e	7

Statutes

Narcotic Drugs Import and Export Act, 35 Stat. 614 (1909), as amended 21 USC Section 174 (1956)	3, 4, 5, 6, 16, 17, 18
Stats. 1957, Ch. 1885	9
28 USC Sections 1254(1), 1651(a)	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No.

CHARLES FREDERICK ROCHA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Charles Frederick Rocha, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on December 12, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Court, printed in Appendix "A" hereto, infra, pp. i-viii, is reported in ..... F.2d ..... (December 12, 1967).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment in this case on December 12, 1967. (A copy thereof is printed in Appendix "B".) A timely petition for rehearing was filed on January 10, 1968 and denied by said Court on January 18, 1968. On application of petitioner, that Court stayed the issuance of its mandate under Rule 26 of that Court pending the filing, consideration and disposition of this petition by this Court providing this petition is filed on or before February 19, 1968.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Sections 1254(1) and 1651(a).

QUESTIONS PRESENTED

1. When evidence is seized under color of a search warrant issued by a California state magistrate and the supporting affidavit is found to be illegal by the issuing magistrate; and, because of this, the magistrate suppresses the evidence so seized, can the federal government lawfully pursue a prosecution based on the same illegally obtained evidence, especially when there is no Court order (state or federal) to bring the evidence before the federal Court?

2. Is an affidavit supporting a search warrant issued by a state magistrate valid if based merely upon hearsay or hearsay upon hearsay?

3. If a search warrant is held to be invalid after officers have elected to obtain on and execute it, can the officers defend the search on the alternative basis that there was probable cause to arrest and search without a warrant prior to obtaining the warrant and such information was not properly transmitted to the magistrate at the time of obtaining the warrant?

4. Is the statute under which petitioner stands convicted (21 U.S.C. Section 174) unconstitutional in part in that it provides that whenever on trial for a violation of the section for fraudulently or knowingly importing a narcotic drug into the United States, and the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize a conviction *unless the defendant explains the possession to the satisfaction of the jury?*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Narcotic Drugs Import and Export Act, 35 Stat. 614 (1909) as amended, 21 U.S.C. Section 174 (1956):

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

STATEMENT OF THE CASE

The Court of first instance herein was the United States District Court for the Northern District of California and the basis for jurisdiction therein was the charge that petitioner was indicted with concealing and facilitating the concealment of heroin in violation of the Narcotic Drugs Import and Export Act, 35 Stat. 614 (1909) as amended, 21 U.S.C. Section 174 (1956).

Petitioner was convicted of the charge and sentenced to a term of 10 years imprisonment on May 12, 1966. On May 20, 1966, a timely Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was filed. Thereafter, petitioner's judgment of conviction was affirmed (supra).

Petitioner was arrested at the Sunland Service Station, which he operated, in San Jose, California, on November 23, 1965, by Sergeant Stanley E. Shaver of the Santa Clara County Sheriff's Department for violation of California Health and Safety Code Section 11500, a felony, to wit, possession of heroin. Petitioner posted bail in the state Court, was arraigned and entered a plea of "not guilty" therein.

At the time of petitioner's arrest, Sergeant Shaver executed a search warrant which he had obetined earlier from the Honorable Edward J. Nelson, Judge of the Municipal Court for the San Jose-Milpitas-Alviso Judicial District, County of Santa Clara, California.

Thereafter, and on February 3, 1966, after timely motions to quash the affidavit in support of the search warrant and to suppress the evidence seized by the authority thereof before the said Judge Nelson, the motions were granted and Judge Nelson entered his order suppressing the evidence so seized.[1] Bail was exonerated, the Complaint was dismissed and no further proceedings were had in the California Courts.

The evidence so suppressed had been taken pursuant to the execution of the search warrant from a safe on the premises. Shortly after petitioner's arrest, the suppressed contraband was handed by Sergeant Shaver to a federal agent without a Court order of any kind and was used in petitioner's prosecution by the federal government below.

Thereafter, an indictment was filed in the United States District Court for the Northern District of California, Southern Division, and petitioner was arraigned. He entered a plea of not guilty to the charge of violation of Title 21, U.S.C. Sec. 174, to wit, unlawful sale and concealment of heroin, involving the identical contraband suppressed by Judge Nelson.

---

[1]The motions were made pursuant to the provisions of California Penal Code Sections 1539 and 1540, which sections provide for a hearing to suppress evidence before the magistrate who has issued a search warrant.

A timely motion to suppress the evidence under Rule 41e, Federal Rules of Criminal Procedure, Title 18, *United States Code* was interposed by petitioner. A hearing on the motion was had on February 16, 1966, prior to trial, before the Honorable Lloyd H. Burke, Judge of the District Court. The Court denied the motion on that date. (A copy of the Reporter's Transcript of the hearing has been filed with this Court in the Clerk's certiorari record, together with exhibits which include the transcript of the hearing on the Motion to Suppress on February 3, 1966, before the aforesaid Edward S. Nelson, Judge; Judge Nelson's order suppressing the evidence seized under the execution of the State search warrant; and a copy of the affidavit for search warrant, the search warrant issued by Judge Nelson and executed by Sergeant Shaver and the return of Officer Perovich.)

Thereafter, petitioner was convicted of the federal offense as charged after trial by jury, and on May 12, 1966, was sentenced to a term of ten years imprisonment by the Honorable Albert Wollenberg, Judge of the United States District Court.

The pertinent part of the affidavit for search warrant to establish probable cause is as follows:

> "Following is the basis for affiant's beliefs stated herein:
>
> "Affiant is a deputy sheriff with the Santa Clara County Sheriff's Department investigating illicit narcotics activity in Santa Clara County.
>
> "Affiant this date arrested Frank Benjamin Ram aka Frank Benjamin Reyes, for possession

of heroin and for sale of heroin, occurring in the San Jose area in the past two weeks. On three separate occasions when the suspect Frank Benjamin Ram sold heroin to a Federal Narcotics Agent, said Frank Benjamin Ram has been observed to go to the aforesaid Sunland Service Station at the above address, and to contact the person known as Fred at that address, described as a Mexican male, approximately 40 years of age, and wearing glasses. (Fred Rocha)

"Also arrested by your affiant this date was a woman who was in the company of the aforesaid Frank Benjamin Ram, known to your affiant as Lavina Medina, known to your affiant to be on parole as a narcotics addict, and said Lavina Medina stated to your affiant that the narcotics which were in the possession of Frank Benjamin Ram were obtained by him from Fred at the aforesaid Sunland Service Station. (Fred Rocha)

"Your affiant knows that the aforesaid person known as Fred Rocha works at the aforesaid Sunland Service Station.

"Affiant desires to search at night because, to his knowledge, most narcotic activity takes place at night."

REASONS COMPELLING THE ALLOWANCE OF THE WRIT

1. THE CONTRABAND NOT SUPPRESSED BY THE UNITED STATES DISTRICT COURT WAS NOT LEGALLY BEFORE THE COURT AT THE TIME OF THE MOTION TO SUPPRESS.

The contraband herein was suppressed, after a proper motion was made, by the *very* magistrate who issued the State search warrant under which the contraband was seized. After the Motion to Suppress was

granted by the state Court, the suppressed contraband was turned over to the federal authorities without a Court order of any kind. (See Government's Exhibits Nos. 3 and 4, attached to Reporter's Transcript on the certiorari record on file herein.)

California Penal Code Sec. 1528 provides:

> "If the magistrate is thereupon satisfied of the existence of the ground of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county commanding him forthwith to search the person or place named, for the property or things specified, *and to retain such property or things in his custody subject to order of the Court as provided by Sec. 1536.*" Stats. 1957, Chap 1885. (Emphasis added.)

California Penal Code Sec. 1536 provides:

> "All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the Court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable." Stats. 1957, Chap. 1885.

In that there was no order to deliver the suppressed contraband to the federal government for prosecution, the federal government obtained its possession in contravention of the laws of the State of California. By not attempting to remove the contraband from the State of California in accordance with the State or federal law and by not obtaining a Court Order, nor

obtaining a federal search warrant, the federal government should be barred from considering the contraband as evidence, and the Motion to Suppress should have been granted by the Court herein. *Elkins v. U.S.*, 364 U.S. 206.

The contraband was brought before the federal Court by federal search warrant. (364 U.S. 207, fn. 1.)

---

2. REGARDLESS OF THE STATE COURT PROCEEDINGS HEREIN, THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT DOES NOT MEET FEDERAL STANDARDS.

Evidence secured as a result of the execution of the search warrant herein by State officers was illegally secured and was inadmissible in evidence. The search warrant employed was issued pursuant to an affidavit that was insufficient under the Fourth and Fourteenth amendments to the United States Constitution to show reasonable and probable cause for the search. The insufficiency of the affidavit was duly raised below by pre-trial and on-trial Motions to Suppress the evidence thus obtained.

The affidavit of Edward Perovich, in support of the issuance of the warrant, states of his own knowledge only two things:

1. "Fred Rocha works at the aforesaid Sunland Service Station," and

2. "Most narcotic activity takes place at night."

The magistrate issuing the search warrant may consider only the information brought to his attention

and the reviewing Court may consider only the information before the magistrate at the time of the issuance of the search warrant in determining whether reasonable and probable cause existed. See *Giordenello v. United States,* 357 U.S. 480.

Admission of evidence secured through use of a search warrant issued on the basis of insufficiently corroborated hearsay testimony contravenes the Fourth Amendment to the United States Constitution. Although an affidavit that sets out personal observations relating to probable cause is not insufficient merely because the observations are not those of the affiant, a substantial basis for crediting the hearsay must be presented. *Jones v. the United States,* 362 U.S. 257. In such a case, the affiant must inform the magistrate of some of the facts and circumstances relied upon by the informant in making his statements to the affiant and of facts and circumstances both for concluding that the informant is credible and for concluding that the information communicated to the affiant is reliable. See *Aguilar v. Texas,* 378 U.S. 108. The affidavit cannot be based on the mere suspicion, belief, or conclusion of either affiant or the informant. See *Nathanson v. United States,* 290 U.S. 41, *Aquilar v. Texas,* supra, and *Jones v. United States,* supra.

The information set forth in the affidavit herein fails to meet the federal standards.

The affiant states that he arrested one Frank Benjamin Ram for possession of heroin and for sale of

heroin, occurring in the San Jose area, "in the past two weeks". The affiant further alleged that the said Frank Benjamin Ram had been observed "to contact" the appellant at the Sunland Service Station on three occasions prior to Ram making sales to a federal agent. There is nothing in the affidavit to indicate where the officers executing the affidavit obtained this information. At no place is it set forth that this was a personal observation of the affiant. Not stating that the information was obtained by affiant personally, such information is purely hearsay. Not knowing from whom the information came, its reliability and credibility is nil. Some basis for concluding that such information is credible and reliable must be set forth in the affidavit. See *Aguilar v. Texas,* 378 U.S. 108. Here, there is no allegation whereby credibility could be assumed. Perhaps, the Court in its opinion below, goes on the basic presumption, as many state Courts are prone to do, that *U.S. v. Vantresca* (..... U.S. .....), relaxes *Aguilar*. We submit it does not.

The affiant further sets forth in the affidavit that he received information from one Lavina Medina, "known to your affiant to be on parole as a narcotics addict", to the effect that the narcotics which were in the possession of Frank Benjamin Ram were obtained by him from petitioner "at the aforesaid Sunland Service Station". There is no allegation that she personally observed the said Frank Benjamin Ram obtain the narcotics from petitioner. As such, the statement is not even within the personal knowledge of the informant. It constitutes hearsay upon hearsay.

Further, it should be noted there is no allegation in the affidavit that Lavina Medina is reliable in any sense of the word. To the contrary, the statement that she was on parole as a narcotics addict would support the conclusion that she was not reliable. As stated heretofore, there must be some basis for concluding that such declaration is credible or reliable set forth in the affidavit. See *Aguilar v. Texas,* supra. Here there is no such allegation.

Thus, the allegations regarding the observations of Ram and the information received by Lavina Medina is either unreliable hearsay or hearsay upon hearsay.

A further area exists for skepticism concerning the allegations contained in the affidavit. There is no allegation therein that Frank Benjamin Ram remained in the view of the investigating officers from the times that he was observed to "contact" petitioner (prior to the three alleged sales) up to and including the time of any supposed sales to the Federal agent.

Finally, the affidavit is far more defective in that it fails to state any ground whatever for believing on November 23, 1965, the date of the issuance of the warrant, any narcotics were in the possession of appellant at the Sunland Service Station which he operated. The affidavit relates only to sales alleged to have occurred "in the San Jose area" in the two weeks preceding the issuance of the warrant. Therefore, the affidavit failed as a matter of law to set forth probable cause for the issuance of the search warrant on November 23, 1965.

Accordingly, the District Court erred in denying petitioner's Motions to Suppress, in that evidence secured as a result of that search violated appellant's rights secured by the Fourth Amendment to the United States Constitution. The Court of Appeals compounded the error by affirming appellant's conviction.

At the hearing on the Motion to Suppress herein, the trial Court made the following observations:

At page 109 (R.T.), it stated:

> "Let's grab the case right by the throat. Suppose that this case were tried before a jury and the only evidence offered was the heroin which had been obtained in the course of buying activities by the Federal agents from Ram. That is the one physical evidence, but we have Ram and Lavina Medina as live witnesses. Both of these witnesses gave testimony to the effect that they were in a joint operation with defendant Rocha. The charge is conspiracy connected with the concealment and transportation of heroin. If the jury is willing to accept the testimony of these two witnesses, would it be held up?"

Later it stated at page 110 (R.T.):

> "If your answer to that is in the affirmative, it is obvious you have got probable cause on the same facts."

It states later, at page 110 (R.T.):

> "* * * Now, if those facts are sufficient to support a jury verdict, then inherently they must be strong enough to support probable cause, because if they were not it should never reach a jury."

The cited statements of the Court were erroneous. There is no question that if it is assumed as a primary premise that the evidence was legally obtained, the testimony of the informant under oath at trial provides sufficient probable cause to sustain a verdict of "guilty" by the jury.

There is no question that Federal law provides that the testimony of an accomplice provides sufficient probable cause to sustain a jury verdict of "guilty."

Perhaps it is an anomaly in the law, but the test for probable cause in an affidavit for a search warrant is stricter and more severe than that to sustain a verdict of conviction. No reliability need be shown in the testimony of an informant or co-conspirator in the trial itself, whereas the reliability of an informant or co-conspirator must be shown in an affidavit for search warrant. *Aguilar v. Texas,* supra.

It is submitted that because of this misunderstanding, the trial Court erred in denying petitioner's Motion to Suppress the evidence herein.

---

3. THE SEARCH CANNOT BE JUSTIFIED ON THE ALTERNATIVE BASIS THAT THERE WAS PROBABLE CAUSE TO ARREST WITHOUT A WARRANT WHEN ALL THE ALLEGED FACTS ARE KNOWN TO THE OFFICERS AT THE TIME OF OBTAINING THE WARRANT BUT ARE NOT SET FORTH IN THE AFFIDAVIT.

To hold otherwise would result in an invitation to any law enforcement officer to *"expand"* his information nunc pro tunc in every case of a defective affidavit.

To hold otherwise would effectively destroy the case law developed by this Court in setting adequate standards of probable cause for the issuance of search warrants.

In its Opinion below, the Court of Appeals summarily denies the contention of petitioner that there had been an election herein (Opinion, pp. v-vi), citing only Court of Appeals cases to sustain its position.

Though many examples could be imagined where the "election" theory would not apply and a search could be made on alternative grounds, such is not the case here. All the factual allegations herein were known to the arresting officers at the time of obtaining the warrant.

What is the office of the warrant if arresting officers are allowed to elaborate on the factual allegations after a suspect is arrested pursuant to the color of the warrant?

---

4. THE NARCOTIC DRUGS IMPORT AND EXPORT ACT, 35 STAT. 614 (1909) AS AMENDED, 21 U.S.C. SECTION 174 (1956) IS UNCONSTITUTIONAL IN PART AND IS THEREFORE IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

21 U.S.C. Section 174, provides in part:

> "Whoever * * * conceals * * * or in any manner facilitates the * * * concealment * * * of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, * * * shall be imprisoned * * *."

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction *unless the defendant explains the possession to the satisfaction of the jury.*"

In effect, the statute allows a defendant to be convicted on a presumption which can only be rebutted by his affirmative evidence to the contrary.

A defendant in a criminal case need not take the stand and testify or explain; and if he does not take the stand and explain, he cannot be penalized therefor. *Fifth Amendment to the United States Constitution, Malloy v. Hogan,* 378 U.S. 1, *Griffin v. California,* 380 U.S. 609, *Miranda v. Arizona,* 384 U.S. 436.

The petitioner herein was charged under 21 U.S.C. 174 for concealing and facilitating the sale of heroin. At the trial, he took the stand and testified.[2] He denied knowledge of the presence of the contraband and gave no evidence to indicate the heroin was grown inside the state of California. Thus, he was convicted on a presumption which, in substance, has been negated by this Court in its decisions of the past few years.

---

[2]Although petitioner tried to curtail the points on appeal to the errors in the Motion to Suppress, the Court of Appeals ordered petitioner to prepare a copy of the trial reporter's transcript of all trial testimony *at petitioner's expense* and against his vigorous protests. Thus, his testimony is properly before this court in the record filed herein.

It should be noted that finding the statute unconstitutional would not deter narcotic prosecutions by the several states. In most areas, federal narcotic law enforcement presently merely duplicates state law enforcement. All 50 states have stringent and adequate narcotic laws. The state of California is more oppressive in its sentencing than the federal government. See *California Health & Safety Code* Sections 11500 et seq.

A holding of unconstitutionality herein would stop duplication of law enforcement activities in the narcotic field and in no way effect the efficiency of law enforcement. Such would reduce the cost of narcotic enforcement to the federal government and retain jurisdiction in the federal government to cases which are truly interstate in nature and to cases involving smuggling.

The confusion, unequal treatment and jeopardy-like situations apparent in cases such as the case at bench would vanish if adequate standards are set by this Court and by a finding that the presumption in 21 U.S.C. Section 174 is unconstitutional as being in violation of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the reasons stated above, we respectfully submit that certiorari should issue to review the decision of the Court below.

Dated, San Francisco, California,
February 14, 1968.

WILLIAM KLEIN,
Attorney for Petitioner.

EDWARD L. CRAGEN,
Of Counsel.

(Appendices "A" and "B" Follow)

Appendix "A"

United States Court of Appeals
for the Ninth Circuit

CHARLES FREDERICK ROCHA, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 21,111

[December 12, 1967]

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: POPE, HAMLEY and MERRILL,
Circuit Judges

HAMLEY, Circuit Judge:

Charles Frederick Rocha appeals from his conviction on a charge of concealing and facilitating the concealment of heroin in violation of the Narcotic Drugs Import and Export Act, 35 Stat. 614 (1909) as amended, 21 U.S.C. § 174 (1964).

Rocha's only point on appeal is that the trial court should have granted his pretrial motion to suppress certain evidence and therefore erred in admitting the evidence at the trial. The evidence in question consists of 57.585 grams of heroin which was found at Rocha's service station as a result of a search made immediately after his arrest at the service station on September 23, 1965.

Rocha made a pretrial motion to suppress the evidence. Three grounds for such relief were asserted, namely: (1) the evidence was seized under color of a search warrant issued by a California state magistrate, and the state warrant is illegal under California law because the supporting affidavit is inadequate; (2) the issuing state magistrate having granted a motion to suppress the evidence on the ground that the affidavit supporting the warrant is inadequate, it was unlawful for state officers to thereafter turn over the evidence to federal officers and it was improper for federal officers to receive the same; and (3) the affidavit supporting the search warrant is insufficient under federal law.

A hearing was had on the pretrial motion to suppress, and the motion was denied. The court held that the affidavit was sufficient and, furthermore, the arrest was based on probable cause and the search incident thereto. The motion to suppress was renewed during the trial and again denied. The evidence was thereafter admitted over Rocha's objection.

On this appeal Rocha asks us to limit our review of the testimony bearing on the search and seizure to that which was received during the hearing on the pretrial motion. The Government, on the other hand, invites us to also consider all evidence received at the trial which is relevant to the search and seizure question.

In determining whether a district court erred in admitting evidence claimed to have been seized as the result of an unreasonable search, an appellate court

will not ordinarily limit itself to the testimony received at a pretrial motion to suppress, but will also consider pertinent testimony given at the trial. See *Carroll v. United States,* 267 U.S. 132, 162; *Rent v. United States,* 5 Cir., 209 F.2d 893.

In this case, however, when the motion to suppress was renewed during the trial, the trial court inquired whether the parties desired to submit additional evidence as to the reasonableness of the search. Upon being advised that no additional testimony was to be offered, the court suggested that, in deciding the renewed motion to suppress, only the transcript of the pretrial motion be considered. Both counsel agreed to this procedure. Later in the trial, when the seized article was offered in evidence, counsel for Rocha objected on the grounds stated in his prior motion to suppress. As before stated, the objection was overruled.

Under these special circumstances, and without deciding whether we are required to do so, we will confine ourselves to the facts as revealed by the record on the pretrial motion to suppress.

At the pretrial hearing only one witness was called, Sergeant Stanley E. Shaver of the Santa Clara County Sheriff's Department. His testimony revealed that in November, 1965, his office, along with the Federal Bureau of Narcotics and the city police, was engaged in the investigation of narcotics traffic in the Santa Clara area. A federal undercover agent, Rustam Aruslan, had penetrated a small narcotics ring and, between November 16 and November 23, 1965,

had made three purchass of heroin through one Frank B. Ram.

In an attempt to reach Ram's source of supply, a listening device was placed on the undercover agent. Through this means Sergeant Shaver and another federal agent were able to overhear Ram tell the undercover agent that his source of supply was of Mexican descent, operated a service station in the city of Santa Clara, and kept narcotics in the service station's safe. On the three occasions when the undercover agent gave Ram money to purchase heroin from his source, a surveillance team of federal and state agents followed Ram and his girl friend, Lavina Medina, to a service station owned by the defendant Rocha. On each occasion the middleman, Ram, later returned to the undercover agent with the requested heroin.

On the last of the three purchases, Ram and Miss Medina were arrested by the federal agent, Aruslan, when they returned with the heroin. Under questioning by federal and state officers, both named Rocha as their source of supply. Ram voluntarily agreed to telephone Rocha at the service station to ascertain if Rocha had more narcotics in his safe. Sergeant Shaver testified that federal officers monitored the conversation and someone answering as "Fred" stated that he had only "a couple of pieces or two left." At the same time an agent watching Rocha's service station reported that Rocha answered the telephone.

After the conversation a state police officer was sent to a local magistrate to get a search warrant. When

he returned with the search warrant, federal and local officers proceeded to the service station. In the immediate presence of federal officers, Sergeant Shaver placed Rocha under arrest, and then handed him the search warrant. Shaver searched the safe, found the heroin, and while still at the gasoline station, gave it to a federal agent assisting in the arrest.

Two months later defendant Rocha succeeded in having this evidence suppressed by the local magistrate who originally issued the warrant. Apparently this was done on the ground that the affidavit supporting the search warrant was insufficient. The motion was granted, however, "without prejudice to the People offering said evidence at any future hearing in this matter as being incident to a legal arrest."

On this appeal Rocha contends that the district court erred in holding that the affidavit on which the search warrant was issued was suffcient. Further, if the search warrant is held to be invalid, Rocha argues that the search cannot be justified as incident to a lawful arrest because, having elected to get a search warrant, the officers are barred from defending the search in any other manner.

Assuming that the search warrant was invalid because the supporting affidavit was insufficient, we hold that this does not preclude the Government from justifying the search as incident to a lawful arrest.

In *Bell v. United States,* 9 Cir., 371 F.2d 35, we refused to invalidate an arrest where, although the accompanying arrest warrant was admittedly invalid,

the arresting officers had probable cause to arrest the defendant without a warrant. The same reasoning is more compelling where, as here, the officers have probable cause to arrest without a warrant and, as an additional precaution, procure a search warrant. By so doing they have not "elected," as defendant asserts, to proceed on the basis of the search warrant alone. See *United States v. Gearhart,* 4 Cir., 326 F.2d 412.

Having concluded that the search may be upheld on alternate grounds, we now turn to the lawfulness of the arrest absent a valid warrant. Although Rocha was first arrested by Sergeant Shaver, a state officer, it is clear from Sergeant Shaver's testimony, read as a whole, that Rocha was also under federal arrest prior to the search. This was a joint federal-state enterprise throughout and the officers involved intended this to be a federal prosecution.[1] This interpretation of Shaver's testimony is further supported by the fact that, after seizing the evidence in question, he immediately handed it to the federal officer.

The authority of the federal officers to arrest without a warrant must be determined by federal law unless that law is silent. *Miller v. United States,* 357 U.S. 301, 305; *Williams v. United States,* 9 Cir., 273 F.2d 781, 790. Here it is not. Under section 7607(2), added in 1956 to the Internal Revenue Code of 1954, 26 U.S.C. §7607(2) (1964), agents of the Federal

[1]On direct examination Sergeant Shaver stated that his department, the Federal Bureau of Narcotics, the San Jose Police Department and the Santa Clara Police Department were all involved in the investigation. Under questioning by the trial court, he stated that at the time the surveillance of Ram was undertaken this was going to be a federal case.

Bureau of Narcotics may arrest persons where the arresting officers have reasonable grounds to believe that the person arrested has committed or is committing a violation of the federal narcotic laws.[2]

Here a federal undercover agent had given Ram money on three occasions to purchase heroin from his source. On each occasion Ram was eventually trailed to Rocha's service station. Further, Ram's description of his source, given at a time when he was unaware of the undercover agent's identity, further confirmed the officer's suspicion that Rocha's service station was the place where Ram picked up his heroin. And, finally, in admitting his own guilt, Ram implicated Rocha as the source of the heroin. His story was further verified when officers overheard the telephone conversation between Ram and Rocha.

In view of these facts and circumstances, known to the arresting officers through personal observation and reasonably trustworthy information, they had reasonable cause to believe that Rocha had been or was violating the federal narcotic laws. See *Draper v. United States,* 358 U.S. 307; *Sanchez v. United States,* 9 Cir., 311 F.2d 327.[3]

---

[2]Section 7607(2), however, goes no further than the Fourth Amendment in permitting arrests without a warrant based on "probable cause." *Draper v. United States,* 358 U.S. 307, 310; *Ng Pui Yu v. United States,* 9 Cir., 352 F.2d 626, 630; *Rogers v. United States,* 9 Cir., 267 F.2d 79, 84.

[3]Our conclusion would be the same even if we were mistaken in holding that Rocha was arrested by federal agents, rather than state officers, prior to the search. Section 836, Calif. Penal Code (1957) permits arrest without a warrant by state officers where there is reasonable cause to believe the arrested person has committed a felony. Since this is a federal prosecution, the test in determining probable cause is one of federal law. *Elkins v. United States,* 364 U.S. 206, 223-224.

Finally Rocha argues that the evidence should have been excluded under our power over the administration of criminal justice in the federal courts. *Cf. McNabb v. United States,* 318 U.S. 332. Rocha's argument rests on the assumption that Sergeant Shaver's act of handing to federal officers the evidence which Shaver found in Rocha's safe violated Calif. Penal Code §§ 1528 and 1536 (1957).[4]

Without expressing any view as to the merits of this argument had there been a violation of the above statutes, it is clear that in this instance there was no such violation. As we have held, there was, in effect, a dual state and federal arrest of Rocha prior to the seizure of the heroin. Moreover, even the state arresting officer was not confined to proceeding under the search warrant alone, as the state magistrate implicitly ruled when he held the state search warrant invalid.

Affirmed.

---

[4]Section 1528 provides:

"If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant . . . to a peace officer in his county, commanding him forthwith to search the person or place named, for the property or things specified, and to retain such property or things in his custody subject to order of the court as provided by Section 1536."

Section 1536 provides:

"All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him. . . ."

Appendix "B"

United States Court of Appeals
for the Ninth Circuit

CHARLES FREDERICK ROCHA, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 21,111

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered December 12, 1967

LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
MAR 14 1968
JOHN F. DAVIS, CLERK

No. 1127

In the Supreme Court of the United States

OCTOBER TERM, 1967

CHARLES FREDERICK ROCHA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1127

CHARLES FREDERICK ROCHA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1967. A timely petition for rehearing was denied on January 18, 1968. The petition for a writ of certiorari was filed on February 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search of petitioner's service station was properly sustained as incident to a valid arrest based upon probable cause.

2. Whether the presumption of 21 U.S.C. 174, based upon unexplained possession of narcotics, is valid.

STATEMENT

After a trial by jury in the United States District Court for the Northern District of California, petitioner was convicted of concealing and facilitating the concealment of narcotics, in violation of 21 U.S.C. 174. He was sentenced to imprisonment for a period of ten years (1 R. 2-4, 58). The court of appeals affirmed.

Prior to trial petitioner moved to suppress as evidence heroin seized at his place of business, urging that the search was made under a state search warrant which the issuing magistrate had later declared invalid; that the complaint upon which the warrant was based was insufficient under both state and federal law; and that the narcotics had been turned over to federal officers in violation of state law (1 R. 8-9; 2 R. 2-3). The government, while contending that the affidavit for search warrant was sufficient, also urged that the search was incident to a valid arrest by state and federal officers based upon probable cause to believe that petitioner had committed a felony (2 R. 16-17).

On November 16, 1965, federal narcotics agent Aruslan, who was working in conjunction with local

officers, purchased an ounce of heroin from one Frank Ram in Santa Clara, California (2 R. 18-20). On November 18, Aruslan met again with Ram and arranged to buy an additional three ounces of heroin. Ram said that he would go to his source of supply, which was not far away. Ram was observed to leave Aruslan and follow a circuitous route, driving at different speeds, making a number of stops, and finally arriving at a Sunland service station in Santa Clara. There he met petitioner and conversed with him for a few minutes. He then returned to Aruslan and delivered the promised heroin (2 R. 20-23, 57-58).

On November 22, Ram again met Aruslan, and agreed to go to his source to get three more ounces of heroin. After proceeding in much the same fashion as on the 18th, Ram arrived at the Sunland station, where he conversed with petitioner. He then returned to Aruslan and delivered three ounces of heroin. At various times, Ram told Aruslan that his connection was of Mexican descent, a businessman in Santa Clara, and that he kept narcotics in the safe of a service station which he operated. It was learned from other sources that petitioner operated the service station where he had been seen talking with Ram (2 R. 23-26).

On November 23, Aruslan made another purchase of heroin from Ram and then arrested him. Ram said that he obtained his narcotics from petitioner and produced a business card with petitioner's name on it. Ram agreed to call petitioner and, after dialing the telephone number on the card, talked with someone whom he addressed as "Fred". Ram told this person

that he had completed the sale and that the buyer wanted to get some more. Aruslan, who listened to the conversation with Ram's consent, heard the person at the other end of the line say that he had only a couple of pieces left, which would have to last until he could make another trip. The other party also asked whether Ram had cut the stuff which he just got. At the time of this conversation, petitioner was observed by other officers talking on the telephone (2 R. 26-30).

A state warrant authorizing the search of the safe at the Sunland service station was obtained (1 R. 21-24; 2 R. 30).[1] State and federal officers went to the service station, placed petitioner under arrest, and removed two packages of heroin from the unlocked safe. The heroin was handed over to Aruslan (2 R. 30, 93-97). On February 3, 1966, the magistrate who issued the search warrant sustained petitioner's motion to quash it. His order, however, was "without prejudice to the People offering said evidence at any future hearing in this matter as being incident to a legal arrest" (1 R. 27).

The trial court denied the motion to suppress, both on the ground that the affidavit for the search warrant was sufficient and that the search was properly incident to a valid arrest based upon probable cause (2 R. 109-113). The court of appeals sustained the search as incident to arrest, finding it unnecessary to consider the adequacy of the affidavit for the search warrant.

---

[1] The relevant portions of the affidavit are set forth in the Petition, pages 7-8.

ARGUMENT

1. The federal agents and state officer who arrested petitioner had more than adequate probable cause to arrest petitioner without a warrant. On several occasions, Ram filled orders for narcotics after making visits to petitioner. He also gave information concerning his "connection" which matched petitioner's location and occupation. The telephone call made after Ram's arrest, which agent Aruslan overheard with Ram's consent, clearly pointed to petitioner as Ram's source of narcotics. Thus, the asserted invalidity of the search warrant did not affect the propriety of a search which was incident to a valid arrest, based upon probable cause. *Margeson* v. *United States*, 361 F. 2d 327, 328 (C.A. 1); *Lawton* v. *Dacey*, 352 F. 2d 61 (C.A. 1); *United States* v. *Bozza*, 365 F. 2d 206, 224-225 (C.A. 2); *United States* v. *Hall*, 348 F. 2d 837, 841-842 (C.A. 2), certiorari denied, 382 U.S. 947; *United States* v. *Gearhart*, 326 F. 2d 412 (C.A. 4); *Dearinger* v. *United States*, 378 F. 2d 346, 347 (C.A. 9), certiorari denied, 389 U.S. 885; *Bell* v. *United States*, 371 F. 2d 35 (C.A. 9), certiorari denied, 386 U.S. 1040.[2]

2. The contention, made for the first time here, that the presumption of 21 U.S.C. 174, arising from possession of narcotics, violates the Fifth Amendment is without merit. *Yee Hem* v. *United States*, 268 U.S. 178; *Roviaro* v. *United States*, 353 U.S. 53, 63. Cf. *United States* v. *Gainey*, 380 U.S. 63.

---

[2] The court of appeals properly held that this case involved no violation of state law by turning over the narcotics to a federal agent, as this was a joint state and federal search.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

MARCH 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 293154 639